CYPRUS SHOSHONE COAL CORP.

IBLA 90-169 Decided April 15, 1998

Appeal from a Decision of the District Manager, Rawlins District, Wyoming, Bureau of Land Management, notifying Cyprus Shoshone Coal Corporation that it was in noncompliance and requiring payment of royalty for bypassed coal. Wyoming 0150169.

Affirmed in part, reversed in part, set aside in part, and remanded.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

   Recoverable coal reserves, which are identified during the course of approval of the resource recovery and protection plan submitted by the lessee, consist of the coal that can be mined from a technical standpoint, based on the physical characteristics of the coal resource, and are not affected by the internal economics of a particular lessee or the absence of transportation or a market. The recoverable coal reserve is the coal identified as the coal to be mined in an approved resource recovery and protection plan.

2. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

   Maximum economic recovery is determined by applying standard industry operating practices to the coal deposit without regard to the financial or contractual status of an individual operator/lessee. The test is objective, is based on what a "prudent man" would do, and hinges upon whether the leased coal deposit is inherently profitable to mine, considering the physical nature of the deposit, the costs of producing, processing and transporting the coal, the quality, quantity, and marketability of the coal, and the anticipated price at which the coal can be sold.

3. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

The maximum economic recovery determination is a necessary part of the approval of a resource recovery and protection plan, and must be made before the actual coal mining operations commence. If properly formulated, maximum economic recovery will be reflected in the resource recovery and protection plan submitted to BLM for approval. When the authorized officer makes the maximum economic recovery determination based on review of the resource recovery and protection plan and approves the plan, the operator must mine the leased Federal coal in accordance with the approved plan. By doing so, the operator will achieve maximum economic recovery. Conversely, maximum economic recovery will not be achieved if the leased coal is not mined in accordance with an approved resource recovery and protection plan.

4. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

The procedure for modifying a resource recovery and protection plan can be initiated by the authorized officer or by the operator/lessee. Thus, when an operator/lessee with an approved resource recovery and protection plan decides to bypass a portion of a coal deposit scheduled to be mined under the approved plan, that modification of the plan must be submitted for approval by BLM, and the operator/lessee must justify the bypass by setting out the change in circumstances resulting in a change in the maximum economic recovery. Based on the documents describing the proposed modification, and the justification for the proposed modification, the authorized officer may approve, set conditions for approval, or disapprove the modification.

5. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

Nothing in the statutes or regulations applicable to leasing Federal coal permits or calls for payment of a compensatory royalty, which is not a production royalty, based on the value of unmined coal.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, and Michael R. Peelish, Esq., Englewood, Colorado, for Appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Cyprus Shoshone Coal Corporation (Cyprus) has appealed from a December 4, 1989, Decision of the District Manager, Rawlins District, Wyoming, Bureau of Land Management (BLM or Bureau), notifying Cyprus that its underground coal mining operations at the Shoshone No. 1 mine were not in compliance with the terms of lease No. WY 0150169, and directing Cyprus to pay a compensatory royalty for the coal which had been bypassed by Cyprus. 1/

Coal lease Wyoming 0150169, originally issued effective January 1, 1964, leased the coal in sec. 22, T. 23 N., R. 81 W., sixth principal meridian, Carbon County, Wyoming, pursuant to the Mineral Leasing Act (MLA), as amended, 30 U.S.C. §§ 181-287 (1994). 2/ Cyprus currently holds the lease and operates the Shoshone No. 1 mine, which includes coal lease Wyoming 0150169 and various adjacent leases. This case arises from Cyprus' admitted failure to mine a portion of the sixth left longwall panel (6L Panel), located partially in lands subject to coal lease Wyoming 0150169, with 224,870 tons of Federal coal being left unmined. 3/

The circumstances leading to Cyprus' decision to bypass the Federal coal in the 6L Panel are explicated in an April 20, 1990, affidavit by Cyprus employee, Gardar G. Dahl, Jr. (Dahl). 4/ (Ex. I to SOR.) Cyprus

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1/ Under 43 C.F.R. § 4.412, the statement of reasons (SOR) for appeal is due 30 days after filing the notice of appeal. Cyprus sought and received several extensions of time to file its SOR, which was filed on Apr. 24, 1990. Under 43 C.F.R. § 4.414, BLM may file an answer "within 30 days after service [of the SOR]." The Bureau filed a request for permission to file an answer enclosed with its petition on Oct. 25, 1990. Cyprus seeks to have the Board preclude BLM from participating in this proceeding, arguing that BLM's failure to file an answer in a timely manner must be conclusively deemed to preclude BLM's participation. (Objection to Request for Permission to File, Answer at 4.) The regulation at 43 C.F.R. § 4.414 provides that an untimely answer "may be disregarded in deciding the appeal" (emphasis added), and we might be inclined to consider Cyprus' request if Cyprus had been prejudiced by BLM's dilatory filing. There is no evidence that Cyprus was prejudiced, and we grant BLM's request and accept its answer. American Gilsonite Co., 111 IBLA 1, 6-10, 96 I.D. 408, 411-13 (1989).

2/ When the lease was readjusted effective Jan. 1, 1984, it was made subject to the provisions of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083, 30 U.S.C. §§ 201-209 (1994).

3/ There is no contention that the amount of coal deemed to have been bypassed was incorrect. The unmined portion of the 6L Panel also contains approximately 375,130 tons of coal situated in adjacent private land.

4/ The description of the mining method found in this Decision is a much condensed version of that found in the affidavit, and some liberty may have been taken in the condensation.

uses the longwall mining method to extract coal from the Shoshone No. 1 mine. A longwall panel is a rectangular block of coal with one side being much longer than the other. The first step in developing a longwall panel is to drive two parallel sets of entries (gateroads) along the length of the panel using a continuous miner. After the gateroads have been driven the full length of a panel, the longwall face is established between the gateroads across the short side at the back of the panel. The longwall shearing machine cuts the coal from the panel moving from gateroad to gateroad under cover of a canopy of self advancing steel supports. The mining advances (retreats) along the panel, moving from the back toward the main haulageway system. The gateroads must be driven the full length of the panel and the longwall face must be established at the far end of the panel before actual longwall mining operations can commence. After the gateroads and longwall face have been opened in the Shoshone No. 1 mine, it normally takes about 6 weeks to move the canopy and longwall miner from a completed panel to a newly developed panel. During the period when the canopy and longwall miner are moved from a completed panel to a newly developed panel there is no production and contractual commitments are normally met using previously mined coal.

Cyprus purchased the Shoshone No. 1 mine in September 1987. Operations had been suspended by Cyprus' predecessor on a temporary basis in December 1986 and the mine had been sealed to prevent spontaneous combustion. Noting signs of oxidation upon reopening the mine, Cyprus decided to immediately commence mining the 5L Panel. The coal produced was sold on a spot market basis through December 1987.

Negotiations for a long-term sales agreement were initiated with the Northern Indiana Public Service Company (NIPSCO) in December 1987, and a contract was executed on February 1, 1988. This contract, which was secured more quickly than anticipated, called for delivery of larger quantities of coal at an earlier date than had been forecast by Cyprus. The agreement went into effect on April 1, 1988, but contained a provision that NIPSCO could walk away at any time prior to June 1, 1988. Immediately following execution of the contract Cyprus began hiring miners. 5/

Development of the 6L Panel commenced in May 1988 when Cyprus began to drive the gateroads for that panel. In January 1989, gateroad development at the 6L Panel was curtailed before the gateroads had been driven their full length to allow shortening of the face at the 5L Panel. In mid-April of that year the reserves in the 5L Panel were exhausted.

Cyprus states that on April 17, 1989, it decided that it would not drive the gateroads the full length of the 6L Panel in order to maintain sufficient production to meet its new contract commitments. (SOR at 5.)

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5/ Dahl states that hiring and operations were curtailed by Cyprus "until a firm direction for business development could be established." (Ex. I to SOR at 6.)

The Bureau was not informed of this decision. Instead of completing the gateroads for the full length, the longwall face was opened at the end of the gateroads as they existed in April, shortening the 6L Panel, and leaving 224,870 tons of Federal coal in the undeveloped portion of that panel. The 7L gateroad development commenced in May 1988, and the 8L gateroad development, which was delayed by a lack of miners and late equipment delivery, commenced in September 1988. Longwall mining operations in the shortened 6L Panel commenced on June 15, 1989, when the development work was completed.

During an August 10, 1989, BLM inspection of the Shoshone No. 1 mine, BLM inspectors discovered that a portion of the 6L Panel had been bypassed. Following this inspection the Assistant District Manager, Division of Mineral Resources, Rawlins District, BLM, sent a letter to Cyprus, dated August 16, 1989, advising Cyprus that (1) it was not operating under the formal resource recovery and protection plan (hereafter referred to as the mine plan) initially approved on July 22, 1983, because it had not mined a "significant portion" of the 6L Panel 6/ (including a portion of that panel lying within lease Wyoming 0150169); and (2) that it had failed to tender a modification of its mine plan for approval. Cyprus was advised that this action constituted a violation of 43 C.F.R. § 3481.1(b), under which mining operations are to be conducted in accordance with an approved mine plan, and 43 C.F.R. § 3482.2(c)(2), which provides for submission of mine plan modifications. The Bureau also stated that the deviation had resulted in a violation of 43 C.F.R. §§ 3481.1(c) and 3484.1(b)(4), which require a lessee to prevent "wasting" coal. Cyprus was directed to correct the violations within 10 days of receipt of the letter by submitting a modified mine plan, a written justification for the modification, and a proposal for the future extraction of the unmined coal remaining in the 6L Panel. Finally, BLM stated that "[f]ailure to respond to the actions necessary to correct these violations within the time frame prescribed could result in a notice of noncompliance."

On August 28, 1989, Cyprus submitted its modified mine plan, plan map, and written justification. A "draft" proposal for room and pillar extraction of the bypassed Federal coal in the 6L Panel was included. 7/ In a September 8, 1989, letter, BLM directed Cyprus to submit a final mine plan modification upon completion of its study of the feasibility of room and

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6/ The term "mine plan" is used in this Decision to designate the "resource recovery and protection plan" described at 43 C.F.R. § 3480.05(34). The longwall panel numbering designates the intended order of development, with the 6L Panel being the sixth panel to be developed on the left side of the main haulageway. The Aug. 16 letter incorrectly referred to the "seventh left panel."

7/ Room and pillar mining had been discussed during the course of an Aug. 25, 1989, meeting between representatives of Cyprus and BLM. Id. At that meeting, BLM was informed that the draft proposal was undergoing a feasibility study which was to be completed by Oct. 31, 1989.

pillar mining, stating: "The final modification along with all previously submitted materials will be evaluated with emphasis on maximum economic recovery of the [F]ederal resource, and a decision for approval or disapproval will then be made. At this point in time any royalty deemed necessary will be assessed."

The Bureau received the results of the feasibility study on November 2, 1989. Based on its study Cyprus considered it "uneconomical and unsafe" to mine the remainder of the 6L Panel using the room and pillar method. (Decision at 2.) On December 4, 1989, the District Manager issued his notice of noncompliance. After reviewing Cyprus' justification for bypassing the 224,870 tons of coal in the leased land, the District Manager concluded that Cyprus could have recovered this coal:

> In the justification [Cyprus] states that they were aware that two sets of gate roads would need to be completed before mining could commence in the 6th Left Longwall panel, but that they were waiting until a contract was secured before hiring of personnel to begin development work. After the development work began, [Cyprus] states that equipment problems occurred that resulted in poor rates of advance. The justification indicates that [Cyprus] had neither adequate equipment [n]or personnel to meet both the contract and abide by the approved mine plan. A decision was made by [Cyprus] to fulfill the contract and thus deviate from the approved mine plan without knowledge or consent of the authorized officer of this agency. It is the opinion of this office that the contract secured by [Cyprus] should have been written so that the personnel and equipment available could have fulfilled contractual obligations within the approved mine plan. An alternative could have been for [Cyprus] to have secured adequate personnel and equipment to fulfill both obligations.

Id.

The notice of noncompliance set forth the violations resulting from Cyprus' decision to bypass recoverable Federal coal in the 6L Panel. Cyprus was deemed to have violated 43 C.F.R. §§ 3481.1(d) and 3482.1(c)(7) when it failed to notify BLM that the coal would be bypassed and obtain prior approval for doing so. It was also found to have violated 43 C.F.R. §§ 3481.1(c) and 3484.1(b)(4) by allowing the leased coal to be wasted, and to have violated unspecified regulations by failing to achieve maximum economic recovery of the leased coal. 8/ The notice stated that to abate the violations Cyprus was required, in the "public interest," to pay the royalty which would have been paid if the bypassed coal had been mined pursuant to the approved mine plan because Cyprus had not provided adequate reason for its failure to mine the coal, which had caused the coal to be

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8/ The term "maximum economic recovery" is discussed infra.

"irretrievably lost." Id. at 3. Cyprus was directed to pay this royalty within 30 days from the date of receipt of the December 1989 Decision, and to file a written report of actions taken to correct the violations, or risk a cessation order, cancellation proceedings, and/or forfeiture of its lease bond. Cyprus appealed that Decision.

The principal thrust of Cyprus' appeal is that it is not liable for payment of royalty for the bypassed coal. Cyprus admits that when it bypassed the 6L Panel coal it deviated from its approved mine plan without prior notification to or gaining approval from BLM, but argues that it was not required to either notify BLM of the bypass or obtain prior approval for doing so, and that its deviation does not trigger payment of royalty. (SOR at 18.) Cyprus argues that to require payment of royalties imposes a strict standard of liability not mandated by statute or regulation.

We deem it appropriate to begin our discussion of the issues in this case with a discussion of the terms "recoverable coal reserves" and "maximum economic recovery," and "logical mining unit" because those terms are used throughout this Decision and are important to its ultimate outcome.

[1] The term "recoverable" has a legal meaning, and the regulation at 43 C.F.R. § 3480.0-5(a)(32) defines "[r]ecoverable coal reserves" as the "minable reserve base excluding all coal that will be left, such as pillars, fenders, and property barriers." In turn, the "[m]inable reserve base" is defined by 43 C.F.R. § 3480.0-5(a)(23) as "that portion of the coal reserve base which is commercially minable, and includes all coal that will be left, such as coal in pillars, fenders, and property barriers." We have found no applicable law or regulation defining a commercially minable coal reserve, but some guidance is found in Instruction Memorandum (IM) No. 86-323, dated March 18, 1986. In that IM the Acting Director, BLM, stated that the Department will consider coal reserves recoverable when they can be mined from a technical standpoint. For underground mines, factors such as the thickness of the coal seam, the mining height, and the expected percentage of coal to be recovered are considered. 9/ See Encl. 1 attached to IM No. 86-323, at 1-3 and 1-7. In IM No. 86-496, dated May 30, 1986, at page 1, the BLM Director notes "that recoverability is to be based on the physical characteristics of the coal resource * * *. Recoverability should not be affected to an appreciable degree by the internal economics of individual lessees." (IM No. 86-496, at 1.) The Bureau also advises that the absence of transportation or a market should not affect "recoverability." See Encl. 1 attached to IM No. 86-323, at 1-2.

9/ At one time the Department considered coal "of minable thickness, by itself or in combination with other seams, and of marketable quality, by itself or after blending, and could be produced at a profit at current market prices if buyers were available" to be commercially minable. Atlantic Richfield Co., 112 IBLA 115, 123-24 (1989). That definition was changed after the 1982 amendment of 43 C.F.R. Part 3480.

Recoverable coal reserves are identified during the course of approval of the mine plan submitted by the lessee. See 43 C.F.R. § 3482.2(a)(3). In the absence of any modification initiated by the authorized officer (43 C.F.R. § 3482.2(b)) or by the lessee (43 C.F.R. § 3482.2(c)), the recoverable coal reserves will be that coal identified in an approved mine plan as the coal that the operator intends to mine.

[2] Maximum economic recovery is achieved when, considering "standard industry operating practices, all profitable portions of a leased Federal coal deposit * * * [are] mined." 43 C.F.R. § 3480.0-5(a)(21). It is determined by applying "standard industry operating practices" to the coal deposit without regard to the financial or contractual status of an individual operator/lessee. The test is objective and is based on "what a `prudent man' would do when faced with mining operation decisions which affect profitability." 47 Fed. Reg. 33168 (July 30, 1982); cf. United States v. Ohio Oil Co., 240 F. 996, 1000 (D. Wyo. 1916) (objective standard for determining whether a valuable mineral deposit exists). Thus, achievement of maximum economic recovery depends on whether the leased coal deposit is inherently profitable to mine, when considering the physical nature of the deposit affecting the feasibility of mining, the costs of producing, processing and transporting the coal, the quality, quantity, and marketability of the coal, and the anticipated price at which the coal can be sold. 10/

The general performance standards applicable to coal mining operations provide in pertinent part that "[u]pon approval of a [mine plan] * * *, the operator/lessee shall conduct operations to achieve MER [maximum economic recovery] of the Federal coal." 43 C.F.R. § 3484.1(b)(1). Maximum economic recovery is determined after taking into consideration the geologic and other physical conditions found at the leased lands, and, like recoverable coal, it is determined by BLM during the process leading to approval of a mine plan. See 43 C.F.R. §§ 3482.2(a)(2) and 3482.1(c).

The concept of a defined "logical mining unit" is closely tied to maximum economic recovery determinations. This concept was made a part of the MLA by section 5(b) of the FCLAA, 30 U.S.C. § 202a (1994). This section authorizes the Secretary to approve the consolidation of coal leases into a logical mining unit upon determining that maximum economic recovery will be served. Section 5(b) defines a logical mining unit as:

> an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit with due

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10/ This test must be reasonable, however. Economic recovery is not intended to be used "to force any operator/lessee to produce coal at the exact `break-even' point * * * [or] to force a company to mine Federal coal at a loss or to mine Federal coal that cannot be sold under existing market conditions." 47 Fed. Reg. 33168 (July 30, 1982).

> regard to conservation of coal reserves and other resources. A logical mining unit may consist of one or more Federal leaseholds, and may include intervening or adjacent lands in which the United States does not own the coal resources, but all the lands in a logical mining unit must be under the effective control of a single operator, be able to be developed and operated as a single operation and be contiguous.

See also 43 C.F.R. § 3480.0-5(a)(19). When it amended the MLA to include logical mining units, Congress intended to afford the Secretary and the lessees greater flexibility in planning lease development to afford maximum recovery of coal with minimum impact on the environment. H.R. Rep. No. 681, 94th Cong., 2d Sess. 31 (1975), reprinted in 1976 U.S.C.C.A.N. 1943, 1967. Under Departmental regulations, BLM's authorized officer is granted the authority to "approve, disapprove, or approve upon condition(s) LMU [logical mining unit] applications or modifications thereto[,]" and to "direct the establishment of LMU's in the interest of conservation of recoverable coal reserves and other resources[.]" 43 C.F.R. § 3480.0-6(d)(3). In the preamble to final rulemaking for coal exploration and mining operation regulations, the Department stated that it would "only direct establishment of a LMU if it is absolutely necessary to insure MER [maximum economic recovery] of Federal coal bed(s)." 47 Fed. Reg. 33154, 33172 (July 30, 1982). The Department also noted that the criteria for requiring the formation of a logical mining unit would be established on a case by case basis. 47 Fed. Reg. 33154, 33159 (July 30, 1982).

[3] Important to this case is the fact that, for any block of coal, the maximum economic recovery determination is a necessary part of the approval of a mine plan, and must be made before the actual coal mining operations commence. This is necessary because "no [mine plan] or modification thereto shall be approved which * * * is not found to achieve MER [maximum economic recovery] of the Federal coal within * * * [a] Federal lease." 43 C.F.R. § 3482.2(a)(2). Practically speaking, the initial responsibility for this determination rests with the operator. When conducting a feasibility study and formulating a plan for mining a lease or logical mining unit, the operator will design a plan for the orderly development and diligent extraction of the coal deposit, based upon the projected size, shape, and configuration of the coal deposit, with a mine layout appropriate for a mining method selected by the operator. This process necessarily includes consideration of the orderly sequence of development and how maximum economic recovery will be achieved. If properly formulated, all of these considerations will be reflected in the formal mine plan (i.e., resource recovery and protection plan) tendered to BLM for approval. See 43 C.F.R. § 3482.1(c)(7). The "determination of maximum economic recovery shall be made by the authorized officer based on review of the [mine plan]." 43 C.F.R. § 3482.2(a)(2).

It can thus be seen that the process of formulating, submitting, and gaining approval of a mine plan defines maximum economic recovery for a

leased coal deposit. The operator must then mine the leased Federal coal in accordance with the approved mine plan, and, by doing so, the operator will, by definition, achieve maximum economic recovery. Conversely, maximum economic recovery will not be achieved if the leased coal is not mined in accordance with an approved mine plan (a violation of 43 C.F.R. § 3484.1(b)(1)).

[4] Maximum economic recovery rarely remains unchanged throughout the life of a mine. The sales price is often dictated by market conditions beyond the producer's control and can be volatile. Unforeseen regulatory restrictions may be imposed at a later date. Unanticipated faulting may be encountered, the thickness of the coal seam may not be as projected, or the projected recoverable percentage of the coal may be found to be overly optimistic. It can thus be seen that a mine plan should not be and is not cast in concrete with the operator being forever required to conform unerringly with the maximum economic recovery established in its original mine plan. The Department has specifically recognized this fact and provided for modification of the mine plan. 43 C.F.R. § 3482.2. However, as previously noted, the mine plan must be designed to attain maximum economic recovery. This requirement applies to the mine plan initially approved and to any modification of that plan. This fact is clearly set out in 43 C.F.R. § 3482.2(a)(2), which provides that "[n]o [mine plan] or modifi-cation thereto shall be approved which * * * is not found to achieve maximum economic recovery of the Federal coal." (Emphasis added.)

If an operator or lessee with an approved mine plan did not mine (bypassed) a portion of a coalbed scheduled to be mined under the approved mine plan, the operator or lessee would no longer be mining in accordance with that plan. To avoid this violation of the regulations and lease terms, the operator or lessee must amend the mine plan and gain approval of the amended mine plan prior to actually bypassing the coal. This requirement is especially important when the proposed change in the mine plan involves bypassing a block of coal that had previously been included in the recoverable coal reserves. As noted previously, operating pursuant to a properly formulated mining plan will achieve maximum economic recovery.

The procedure for modifying a mine plan can be instituted by the authorized officer (43 C.F.R. § 3482.2(b)) or by the operator/lessee (43 C.F.R. § 3482.2(c)). When the proposed modification of the approved mine plan contemplates bypassing recoverable coal (it is not to be mined), the operator or lessee must justify the bypass. See 43 C.F.R. § 3482.1(c)(7). To do otherwise would be contrary to the requirement that an operator or lessee conduct underground coal mining operations "in accordance with * * * the approved [mine plan]." 43 C.F.R. § 3481.1(b); see Utah Power & Light Co., 118 IBLA 181, 199-200, 98 I.D. 97, 107 (1991).

As a necessary part of the documents in support of a proposed modified mine plan submitted to BLM for approval, the operator should set out

the change in circumstances triggering a change in the maximum economic recovery, such as safety requirements, unanticipated physical occurrences, or unforeseen economic events that render an attempt to mine all or a portion of the recoverable coal uneconomic. In the course of its approval determination, the authorized officer will decide whether maximum economic recovery will be achieved if the coal is mined in accordance with the modified mine plan. 43 C.F.R. § 3482.2(c)(2). Based on the documents describing and setting out justification for the proposed modification, the authorized officer may approve, set conditions for approval, or disapprove the modified mine plan. It would be incorrect for the Department to reject a proposed modified mine plan without cause, and, if we found a decision rejecting a modified mine plan or the conditions for approval of that plan arbitrary, we would have no reservations about reversing that decision. See, e.g., Pogo Producing Co., 138 IBLA 142 (1997); Ark Land Co., 132 IBLA 235 (1995); Peabody Coal Co., 79 IBLA 58 (1984). However, once its mine plan is approved the operator should not deviate from the mine plan without formally submitting a plan modification to BLM.

Cyprus contends that it has never submitted a mine plan and thus there can be no requirement to submit a modification of that plan. It states that the only mine plan in effect for the Shoshone No. 1 mine was State permit No. 477-T2, and BLM has no jurisdiction over that permit. (SOR at 18.) Cyprus is mistaken.

Operations under a Federal coal lease must be conducted pursuant to an approved mine plan. "Before conducting any Federal coal development or mining operations on Federal leases or licenses, the operator/lessee shall submit and obtain approval of a [mine plan]." 43 C.F.R. § 3482.1(b). A mine plan for removal of coal from the land subject to Federal coal lease WY 0150169 was initially approved by the Deputy Assistant Secretary for Energy and Minerals, U.S. Department of the Interior, on July 22, 1983. After Cyprus purchased the Shoshone No. 1 mine in 1987, it applied for renewal of State permit No. 477-T2, which had been issued for operations at the Shoshone No. 1 mine. A detailed mine plan was submitted as a part of Cyprus' renewal application. This mine plan, which provided for sequential recovery of the coal, including the bypassed Federal coal in the 6L Panel, 11/ was received by BLM on February 11, 1988, reviewed, and approved by BLM on July 19, 1988. 12/ See 30 C.F.R. §§ 740.4(d)(4) and 950.20 ("Article V"); Response to Cyprus' SOR (BLM Response) at 2.

The Wyoming Department of Environmental Quality renewed State permit No. 477-T2, effectively issuing a surface mining permit pursuant to a

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11/ See "Mine Plan and Schedule Strike Development for Longwall," Plate M-14.

12/ In the July 19, 1988, letter to the Office of Surface Mining Reclamation and Enforcement (OSM), the District Manager, Rawlins District, Wyoming, BLM, stated: "[Cyprus'] Mine Permit Renewal Application has been reviewed for Resource Recovery and Protection." (Ex. B attached to BLM Response.)

cooperative agreement between the State of Wyoming and OSM. 13/ The OSM then terminated its permit No. WY-038 by memorandum dated October 31, 1988. The conditions for approval of the mine plan were appended as Attachment A to the October 31, 1988, memorandum terminating the OSM permit. In pertinent part, Attachment A provides: (1) the "lessee/operator shall comply with the terms and conditions of * * * the approved mine plan" (Attachment A to Memorandum from Project Leader, OSM, to Chief, Federal Programs Division, OSM, at 1); and (2) the "mining plan approval * * * shall remain in effect until superseded, cancelled, or withdrawn." Id. at 2. On November 1, 1988, the Chief, Federal Lands Branch, OSM, sent a letter to Cyprus, and enclosed a copy of its October 1988 memorandum and attached conditions. He explained that "[m]ining operations on Federal lease * * * W-0150169 must be conducted in accordance with the approved mining plan * * * as well as State permit." The approved mine plan was in effect in April 1989, when Cyprus decided to cut the 6L Panel short and bypass the coal.

When Cyprus altered its mining operations and bypassed the 6L Panel Federal coal, it neither sought modification of its approved mine plan nor presented evidence that the recoverable coal reserves established in its approved mine plan were not inherently profitable to mine at the time of bypass. The recoverable coal reserves identified in its approved mine plan clearly included the bypassed Federal coal in the 6L Panel. If Cyprus had found recovery of the remaining Federal coal in the 6L Panel no longer consistent with the principle of maximum economic recovery, it was both entitled and obligated, under 43 C.F.R. § 3482.2(c)(2), to submit and seek approval of its modified mine plan. Approval of the modified plan would alter the previously established definition of maximum economic recovery for the coal in Cyprus' lease. However, Cyprus did not submit a modified mine plan prior to bypassing the remaining Federal coal in the 6L Panel, and thus did not avail itself of the proper regulatory procedure. Thus, the District Manager's December 1989 conclusion that Cyprus' failure to obtain prior approval for bypassing the Federal coal in the 6L Panel violated Departmental regulations was correct. Cyprus had failed to achieve maximum economic recovery, a violation of 43 C.F.R. § 3484.1(b)(1). 14/

13/ The State of Wyoming and OSM entered into a revised cooperative agreement effective Jan. 15, 1987. See 51 Fed. Reg. 45082 (Dec. 16, 1986). Under this agreement, the Wyoming Department of Environmental Quality assumed primary responsibility for regulating surface coal mining operations (including the surface impacts of underground operations) on Federal lands in Wyoming under the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1994). See 30 C.F.R. § 950.20. However, OSM could not delegate the Secretary's authority under section 7(c) of MLA, as amended, 30 U.S.C. § 207(c) (1994), to approve a mine plan (see 43 C.F.R. § 3482.1(b)) for Federal lands. See 30 U.S.C. § 1273(c) (1994); 30 C.F.R. §§ 740.4 and 745.13; Natural Resources Defense Council, Inc. v. OSM, 94 IBLA 269, 275-76, 93 I.D. 417, 421 (1986).

14/ Cyprus argues that it cannot be charged with a failure to achieve maximum economic recovery because BLM "made no * * * factual determination based upon the MER [maximum economic recovery] criteria * * * with respect to the subject conduct of operations by [Cyprus]." (SOR at 49.) It thus

Cyprus challenges the conclusions in the District Manager's December 1989 Decision that Cyprus was required by 43 C.F.R. § 3482.1(c)(7) to obtain prior BLM approval for any deviation from an approved mine plan, and that when Cyprus bypassed the 6L Panel coal without prior approval it violated that regulation. When seeking approval of a mine plan, an operator or lessee must submit an explanation of how maximum economic recovery of the Federal coal will be achieved. "If a coal bed, or a portion thereof, is not to be mined or is rendered unmineable by the operator/lessee, the operator/lessee shall submit appropriate justification to the authorized officer for approval." 43 C.F.R. § 3482.1(c)(7) (emphasis added).

Cyprus contends that 43 C.F.R. § 3482.1(c)(7) is applicable only to the submission and approval of a initial mine plan, and does not apply to subsequent mining operations. (SOR at 34.) Cyprus overlooks the intent of 43 C.F.R. § 3482.1(b) and (c) and the requirement at 43 C.F.R. § 3482.2(c)(2) that when an operator intends to deviate from the approved mine plan it must submit "a written statement of the proposed change and its justification to the authorized officer." 15/ After reviewing the request for approval of the modification the authorized officer can approve, set conditions for approval, or disapprove the modification. See id. The operator or lessee's explanation of how maximum economic recovery will be achieved, including the required justification when a coal deposit (or part of it) will not be mined or be rendered unmineable by operations, is an essential element of a mine plan. It is no less essential when considering modification of an approved plan.

Notwithstanding the fact that by bypassing the Federal coal remaining in the 6L Panel without modifying its approved mine plan in accordance with established procedure, Cyprus failed to mine all recoverable coal reserves, Cyprus contends that "maximum economic recovery has been and is continuing to be achieved for the W-0150169 reserves." (SOR at 51.) The basis for its argument is that overall coal recovery was greater than it would have

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fn. 14 (continued)
claims that BLM's charge is based solely on Cyprus having bypassed the coal without prior approval. See id. at 50. Cyprus is mistaken. When approving the mine plan BLM examined the plan and was satisfied that if the coal was mined in the manner set out in the mine plan the maximum economic recovery requirement would be satisfied. See 43 C.F.R. § 3482.2(a)(2). The Bureau's conclusion that Cyprus failed to achieve maximum economic recovery is based not on Cyprus' failure to obtain prior approval for its deviation from the mine plan, but upon Cyprus' deviation from the approved mine plan.

15/ According to BLM, at the time of its August 1989 inspection Dahl and other Cyprus employees stated that Cyprus had "forgotten" to send a modified plan for approval. (Ex. H attached to BLM Response at 3.) The District Manager's December 1989 Decision did not restate the charge levelled in the August 1989 BLM letter that Cyprus had violated 43 C.F.R. § 3482.2(c)(2) when it failed to obtain BLM's prior approval for its deviation from the approved mine plan. Cyprus had responded to this charge by submitting a modified mine plan on Aug. 28, 1989.

been if it had not bypassed the 6L Panel because the bypass permitted continued operation at the mine, and the alternative was to close and abandon it. See SOR at 45-46. By contrast, BLM states that mining the 6L Panel coal was still consistent with maximum economic recovery when Cyprus elected to bypass that coal. See BLM Response at 25.

The statements of physical and economic conditions leading to the decision to bypass the 6L Panel coal, as expressed in the affidavits Cyprus has submitted in support of its SOR, can best be described as supporting the conclusion that the decision was a prudent business decision to maintain the rate of production necessary to meet Cyprus' contractual commitments with NIPSCO. In April 1989, Cyprus was faced with the dilemma that it could not meet those contractual requirements with coal produced at the mine and continue development of the gateroads for the 6L Panel. It chose to meet the contractual requirements with mine production. This fact is best said at page 8 of Dahl's affidavit: "Considerable discussion was held as to the advisability of continuing development [of the 6L Panel] beyond the point at which it was terminated, but in the final analysis, it was felt that the risk of losing the NIPSCO contract was too great." (Attachment I to SOR.)

Dahl also points to other conditions contributing to the 6L gateway not being completed before the 5L Panel was mined out. The equipment Cyprus acquired when it purchased the mine was found to be in disrepair and Cyprus was forced to purchase new equipment and there were delays in the delivery of that equipment. He notes the manpower shortages and a 3-week delay caused by a January 1989 roof fall in the 5L Panel tailgate, resulting in a loss of minable coal in that panel, and a 2-week delay caused by a roof fall in the main mine entry. See, e.g., Attachment I to SOR at 3, 4. Dahl indicates that these problems delayed Cyprus' efforts to complete development of the 6L Panel gateroad when the 5L Panel was mined out. See also Ex. H attached to BLM Response at 3. However, Dahl does not explain how any or all of these circumstances rendered the bypassed coal in the 6L Panel uneconomic. 16/ None of the evidence offered by Cyprus suggests that it would not have been possible to profitably mine the bypassed Federal coal in the 6L Panel if the gateways had been fully completed to their full length. 17/ It elected to open the longwall face at the end of the

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16/ In its December 1989 Decision, BLM asserted that Cyprus could have hired more miners and acquired more equipment to fulfill the NIPSCO contract. We recognize the difficulty actually experienced hiring suitable personnel and the need to optimize equipment utilization. We accept that there would have been some delay in the development of the 6L Panel, but also believe that a more aggressive startup program would have materially shortened that delay. We are satisfied that the delays experienced did not change the maximum economic recovery of the leased coal, as that term is used in the regulations.

17/ Cyprus also refers to various State cases involving private mineral leases containing an express or implied covenant requiring diligent production of a commercial ore deposit. See Vitro Minerals Corp. v. Shoni Uranium Corp., 386 P.2d 938, 939 (Wyo. 1963); Colorado Fuel & Iron Co. v. Pryon, 57 P. 51, 54 (Colo. 1898); 58 C.J.S. Mines & Minerals § 183

gateroads as they existed on April 17, 1989, leaving the 224,870 tons of Federal coal in the undeveloped portion of that panel.

Cyprus does not contend that the coal in the 6L Panel was physically different than the coal it mined before and after the decision to bypass. That coal was the same as the coal in the mined portion of the 6L Panel and the coal in the 7L and 8L Panels.

From the statements in the affidavits attached to Cyprus' SOR, it would appear that Cyprus' ultimate decision to bypass that coal in the 6L Panel was the result of two earlier decisions and one made when it decided to bypass that coal. First, when it was selling coal at the spot price, it chose not to leave sufficient inventory to supply a producer during the period it would be completing the gateroads for the 6L Panel and moving the canopy and longwall miner to that panel. Second, when it entered into the NIPSCO contact it accepted the obligation to deliver coal at a contractually determined rate, even though it might not be able to do so during the startup period. Lastly, it elected to meet its contractual commitments with coal from the Shoshone No. 1 mine rather than purchasing coal on the open market while completing the 6L gateroad development. As Dahl said, Cyprus' decision "was caused by the need to fulfill contractual obligations." (Attachment I to SOR at 2-3.) We recognize that the anticipated production shortfall Cyprus faced in April 1989 was significant in terms of the potential effect on the profitability of Cyprus' business venture. However, this problem is a direct result of the contract negotiated with NIPSCO and not as a result of an unforeseen physical occurrence or economic conditions beyond Cyprus' control.

Cyprus has failed to establish that maximum economic recovery of the Wyoming 0150169 reserves justified bypassing the recoverable coal reserves in the 6L Panel. The decision to bypass the coal was not made because some physical or overall economic condition rendered the mining of that coal uneconomic. The coal was bypassed to maintain the rate of recovery necessary to meet contractual commitments to a third party. We find no evidence that, applying the factors set forth in 43 C.F.R. § 3480.0-5(a)(21), it would have been unprofitable to mine that coal. The inability to deliver sufficient coal to NIPSCO to meet Cyprus' contractual commitments to that company did not render the bypassed coal reserves unprofitable to mine. 18/

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fn. 17 (continued)
(1948). Those cases have no direct relevance in the context of Federal coal leasing.

18/ In its December 1989 Decision, BLM indicates that Cyprus was to blame for having to make the bypass decision in April 1989 because it could have negotiated a contract with NIPSCO imposing less stringent delivery requirements. We find nothing to suggest that NIPSCO was willing to enter into a contract with other delivery requirements. On the other hand, we cannot say that Cyprus would have been required to make a bypass decision if it had properly coordinated its contractual and startup commitments.

There is no evidence that, if developed, the reserves remaining in the 6L Panel could not have been mined at a profit. Accordingly, the bypassed coal was a profitable portion of the leased Federal coal deposit, within the meaning of 43 C.F.R. § 3480.0-5(a)(21), when Cyprus elected to bypass that coal.

Thus, we conclude that Cyprus has failed to establish any change in circumstances which rendered the remaining Federal coal in the 6L Panel unprofitable to mine, thus justifying a change in the maximum economic recovery established in that plan. Accordingly, we hold that Cyprus' decision to bypass the coal failed to achieve maximum economic recovery and, thus, violated 43 C.F.R. § 3484.1(b)(1).

Accepting Cyprus' argument that bypassing that coal allowed it to continue to operate the Shoshone No. 1 mine and recover more coal than it would have if Cyprus had lost the NIPSCO contract and closed the mine does nothing to alter the fact that the mine plan formulated by Cyprus and submitted to BLM for approval called for mining the full length of the 6L Panel, and Cyprus remains obligated to mine it. If Cyprus had lost the NIPSCO contract and closed the mine, the coal remaining in that mine (including the bypassed coal) would be available for mining at a future date. On the other hand, if Cyprus' actions permanently rendered coal previously deemed recoverable unrecoverable, any benefits the United States could have realized from its production are lost forever. This is the reason BLM is seeking royalties as compensation for the bypassed coal. It may well have been a prudent business decision to curtail development of the 6L Panel. However, one of the reasonably foreseeable consequences flowing from that decision is the loss that the decision inflicts upon the lessor, and the concomitant obligation to make the lessor whole for the coal which could have otherwise been recovered. See Utah Power & Light Co., supra, at 202, 98 I.D. at 109.

Cyprus contends that the Federal Government, as lessor, was not harmed by its decision to bypass the Federal coal in the 6L Panel because Cyprus' Federal coal lease did not impose an obligation to mine the coal within the leased lands. 19/ We do not hold this belief. The lease did not have to impose a strict requirement to mine the bypassed coal. The 6L Panel coal was identified and deemed economically recoverable in the mine plan Cyprus

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19/ Cyprus also argues that to hold it to a strict standard of liability for bypassing the Federal coal in the 6L Panel violates its rights under the Fifth Amendment to the U.S. Constitution, presumably because it constitutes a taking of private property without due process of law. See SOR at 18. First, we do not view the result in this Decision as imposing strict liability. Second, Cyprus' right to procedural due process is satisfied by appeal to the Board. See 43 C.F.R. § 4.21(a); see also California Portland Cement Co., 40 IBLA 339, 347 (1979), rev'd on other grounds, Rosebud Coal Sales Co. v. Andrus, No. C79-160B (D. Wyo. June 10, 1980), aff'd, 667 F.2d 949 (10th Cir. 1982).

formulated and formally submitted for BLM approval. That same mine plan provided for the orderly and systematic removal of the coal for the entire length of the 6L Panel during the course of Cyprus' mining operations. This was a critical factor in BLM's approval of Cyprus' mine plan. In fact, if the bypassed 6L Panel coal had not been included, Cyprus would have been required to justify its exclusion. When Cyprus unilaterally decided to bypass a portion of the 6L Panel and then actually bypassed it, Cyprus' actions caused injury to the United States. We will, therefore, address the form of action and compensation contemplated by the MLA.

[5] Section 7(a) of MLA, as amended, 30 U.S.C. § 207(a) (1994), provides for payment of royalties for "coal recovered by underground mining operations." The concomitant regulation, 43 C.F.R. § 3473.3-2(a)(2), requires payment of a production royalty on the value of coal "removed from an underground mine." Section 6 of lease Wyoming 0150169 has language to similar effect. Nothing in the statutes, regulations, or lease terms permits or calls for compensation in the form of a royalty based on the value of the unmined coal bypassed during the course of mining, even though the coal may have been bypassed in violation of Departmental regulation and permanently lost.

In Cordero Mining Co., 121 IBLA 314, 319 (1991), we considered a lessee's responsibility for its unauthorized bypass of Federal coal and concluded that BLM lacks authority under MLA and its implementing regulations to seek compensatory royalty. Cordero, the lessee, had bypassed coal when it failed to reach an agreement with the holder of a preexisting oil and gas lease to facilitate removal of a block of coal that would otherwise be left unmined to protect an existing well. Cordero sought BLM's approval of a modified mine plan before bypassing the coal, but bypassed the coal before BLM responded. The Bureau subsequently sought compensatory royalties for the bypassed coal. The Board held that BLM has no statutory or regulatory authority to charge compensatory royalty for the coal that would have been recovered but for the bypass, even though the bypass was a clear violation of the regulations and lease terms. 20/ Our holding in Cordero was correct. See also PacifiCorp, 132 IBLA 98, 101 (1995).

The most obvious course of action when coal is bypassed without BLM approval is found at 43 C.F.R. § 3486.3(a) and (b), which authorizes BLM to issue a notice of noncompliance, requiring action to correct the violation. In its December 1989 Decision notifying Cyprus of the instance of noncompliance, BLM could have required Cyprus to mine the bypassed coal. In the event of the failure to comply with the notice, BLM could order the cessation of mining operations or take action to cancel the lease and seek forfeiture of the lease bond. Id. The Bureau could also ask the Justice Department to institute an action in Federal court on behalf of

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20/ Cordero relies on Utah Power & Light Co., supra, which held that BLM does not have the authority to assess a royalty for a lessee's failure to obtain BLM approval of a mine plan modification prior to temporarily bypassing Federal coal. See id. at 200, 202, 98 I.D. at 107, 109.

the United States for waste, seeking recovery of all damages suffered as a result of the bypass. 21/ The United States, like any private lessor, is entitled to pursue such an action at common law. 22/ Alternatively, BLM has the authority to increase the bond on the lease subject to the mining plan or, when the lease is next readjusted, BLM can add a stipulation to the lease providing that, if the coal in the 6L Panel bypassed by Cyprus is not mined, Cyprus will owe royalties on that coal. Utah Power & Light Co., supra, at 202-03, 98 I.D. at 109.

Accordingly, we affirm the District Manager's December 1989 Decision to the extent that it held that Cyprus had violated Departmental regulations by failing to obtain BLM's approval prior to deviating from its approved mine plan by bypassing the 224,870 tons of Federal coal in the 6L Panel and by failing to achieve maximum economic recovery; we reverse that Decision to the extent that it found the assessment of compensatory royalty for the bypassed coal permissible.

The final Cyprus challenge we will consider is Cyprus' contention that the District Manager erred in his December 1989 Decision when he concluded that Cyprus violated 43 C.F.R. § 3481.1(d) when it failed to notify BLM that it planned to deviate from the approved mine plan by bypassing the coal in the 6L Panel. This regulation provides in relevant part that

> [t]he operator/lessee shall immediately report to the authorized officer any conditions or accidents causing severe injury or loss of life that could affect mining operations conducted under the [mine plan] or threaten significant loss of recoverable coal reserves or damage to the mine, the lands, or other resources * * *.

Cyprus interprets this language as limited to a condition or an accident which causes "severe injury or loss of life."

The Bureau states that it has long interpreted 43 C.F.R. § 3481.1(d) to encompass "conditions or accidents which * * * cause severe injury or loss of life * * * [or] cause or threaten significant loss of recoverable reserves." (Ex. E attached to BLM Response at 1-2 (emphasis added).) The Bureau contends that this interpretation

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21/ In view of this conclusion, we find no need to resolve the question of whether Cyprus also violated 43 C.F.R. §§ 3481.1(c) and 3484.1(b)(4) by committing waste and express no opinion on whether a court might find that Cyprus committed actionable waste.

22/ Action against Cyprus may proceed on the basis of section 26(a) of the coal lease, which makes the lessee "liable to the United States for any damage suffered by the United States in any way arising from or connected with the lessee's activities and operations under this lease." The Bureau reports that the owner of the bypassed private coal in the 6L Panel has recovered damages for the wasting of that coal. The United States would be entitled to nothing less.

is supported by language in proposed rulemaking in which BLM sought to amend 43 C.F.R. § 3481.1(d) to require the operator/lessee to report "any conditions or accidents causing severe injury or loss of life that could affect operations conducted under the mine plan, or threatening significant loss of coal." 56 Fed. Reg. 32038 (July 12, 1991). 23/ There is no suggestion that BLM intended to alter the meaning of the existing regulation. See 56 Fed. Reg. at 32011.

We find nothing in 43 C.F.R. § 3481.1(d) to suggest an intent to have that regulation require an operator/lessee to report only "conditions * * * causing severe injury or loss of life." Rather, the reference to "causing severe injury or loss of life" clearly qualifies the word "accidents," thus avoiding a requirement that minor accidents be reported. It does not qualify the word "conditions." The word "conditions" and the subsequent phrase "accidents causing severe injury or loss of life" are both qualified by the succeeding phrase "that could * * * threaten significant loss of recoverable coal reserves." Had that phrase and the previous phrase referring to "causing severe injury or loss of life" both been intended to qualify the word "conditions," they would have been joined by the word "and." They were not. 24/

However, we find another problem with BLM's citation of this regulation. The regulatory examples of circumstances triggering the notification requirement describe accidents or conditions such as "fires, bumps, squeezes, highwall caving, landslides, inundation of mine with water, and gas outbursts." 43 C.F.R. § 3481.1(d). There is little question that the decision to bypass a portion of the 6L Panel coal was no accident. Considering the named circumstances triggering the requirement to report, we find it difficult to classify a corporate decision to foreshorten development of the 6L Panel in order to maintain production as a "condition." If the bypass decision was not an accident and not a condition, the regulation is not applicable. The portion of the Decision finding Cyprus' failure to report its bypass of the coal in the 6L Panel a violation of 43 C.F.R. § 3481.1(d) is reversed.

In its December 1989 Decision, BLM considered the Federal coal in the 6L Panel "irretrievably lost" when Cyprus bypassed it. (Decision at 3.) In its August 16, 1989, Decision, BLM directed Cyprus to submit a modified mine plan for BLM approval. Accepting Cyprus' statements that the extraction of coal from a new mine (which it refers to as the Shoshone No. 2

23/ The proposed regulations were withdrawn on June 30, 1993. 58 Fed. Reg. 56535 (Oct. 25, 1983).

24/ We also note that the immediate predecessor of 43 C.F.R. § 3481.1(d) required an operator to report "accidents threatening damage to the mine, the lands or other resources." 30 C.F.R. § 211.4(f); 41 Fed. Reg. 20264 (May 17, 1976). The regulation was not limited to accidents causing severe injury or loss of life. The "severe injury or loss of life" language was subsequently added with no suggestion in the preamble to either the proposed or final rulemaking that it was intended to make the regulation applicable only to severe injury or loss of life. See 47 Fed. Reg. 33154 (July 30, 1982); 46 Fed. Reg. 61424 (Dec. 16, 1981).

mine) may be possible (SOR, Ex. F), we deem it appropriate to set aside the December 1989 Decision on appeal to the extent that it finds all of the coal in the 6L Panel irretrievably lost.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed in part, reversed in part, set aside in part, and the case file is remanded to BLM.

R.W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge